NO. 83-1581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRAVIS WARD,

Petitioner,

v.

SENTRY TITLE CO., INC.,
HOME ENGINEERING, INC. AND
ALAN D. WHATLEY

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this case presents any question of important public policy?

2. Whether a review of this case would require that this Court review the entire factual record?

3. Whether the Fifth Circuit Court of Appeals correctly interpreted the substantive Texas law regarding constructive trusts?

4. Whether in reviewing the district court decision, the Fifth Circuit Court of Appeals followed the requirements of the Federal Rules of Civil Procedure and established judicial policy?

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Respondent prays that the Petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in the above entitled case, entered September 26, 1983, and reaffirmed on March 12, 1984, be denied.

COUNTERSTATEMENT OF THE CASE

This case involves title to a nine acre lakefront tract of land located near Athens, Texas, referred to in this litigation as the "Dyckman Tract". Two other tracts, an adjoining 490 acre tract over which passed an easement to the Dyckman Tract and a 16 acre tract located in Athens, Texas (the "LaRue Tract") also figured prominently in this case. Title to all three tracts was taken in the name of Respondent, Sentry Title Co., Inc., or in the name of another company (Home Engineering, Inc.) controlled by Respondent's sole shareholder, Alan Whatley ("Whatley"). Petitioner sought, in this action, to impose a constructive trust on the Dyckman Tract.

Petitioner was a sophisticated and experienced businessman who had known of Whatley for several years but never met him until sometime in 1969 when they first met casually. Thereafter, beginning sometime in the spring of 1970, they met several times to discuss possible land deals in the Athens, Texas area. Their discussions finally focused on the desirability of acquiring the 490 acre tract which Whatley had been negotiating to acquire for some months.[1] Whatley and his then attorney, Bill Hart, had also previously been negotiating with Dyckman to acquire the 9 acre tract.[2] Thereafter, between July 6, 1970 and July 28, 1970, Petitioner, Whatley and Hart had two meetings concerning the purchase of the Dyckman property. On about July 24, 1970, the Dyckman Tract was sold to Home Engineering, Inc., a company controlled by Whatley, for $30,500. The purchase price included a promissory note for $25,500 from Home to Dyckman.

All subsequent payments made on the Dyckman note were made by Home and the property was rendered for ad valorem property tax purposes by Home. Whatley or his companies

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[1] *Harris v. Sentry Title Co., Inc.*, 715 F.2d 941, 944 (5th Cir. 1983) (hereinafter referred to as *Sentry Title Co.*).

[2] Findings of Fact and Conclusion of Law, Findings of Fact No. 19.

were also the makers of the promissory notes given for the other two properties.

After Home encountered financial difficulties, the Dyckman Tract was foreclosed upon and Petitioner asserted a constructive trust on the proceeds from that foreclosure, claiming that Respondent was purchasing the Dyckman Tract and the other properties for Petitioner's benefit. Throughout the proceedings in the trial court and the court of appeals, Petitioner contended that "a confidential or trust relationship between Ward and Whatley existed previously to and apart from the acquisition of the Dyckman 9 acres, sufficient to impose a constructive trust."[3] Otherwise, the Texas Statute of Frauds and Texas Trust Act would clearly have foreclosed Ward's claim. That argument having *twice* been rejected by the Fifth Circuit, Ward now advances, for the first time on appeal, two new theories, one concerning an alleged principal-agent relationship, and another based on an alleged resulting trust. Petitioner further argues that the Fifth Circuit misapplied Texas law to the facts in this case.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present Any Questions Of Important Public Policy and Would Require This Court To Sift Through The Entire Factual Record To Review The Fifth Circuit's Decision.

Petitioner's discussion of the *Erie*[4] doctrine serves only to confuse the issues before this Court. It has never been disputed that Texas substantive law governs this action. The court of appeals clearly recognized this requirement[5] and correctly interpreted the controlling Texas law and applied it to the facts

[3] Post-Trial Brief of Defendant Travis Ward, pp. 2-3; Brief of Appellee p. 34; Supplemental Brief of Appellee, pp. 3-6.

[4] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1937). Similarly, the Rules of Decision Action, 28 U.S.C. §1652 (1976) is of no significance in this matter.

[5] *Sentry Title Co., supra* at 945.

of this case. In truth, Petitioner does not claim an *Erie* violation but simply quarrels with the result of the Fifth Circuit's application of Texas law to the facts of this case. Petitioner's arguments have now been presented four times to the Fifth Circuit and have found no acceptance there.[6] The Petition presents no unusual questions or questions of particularly important public policy. Rather, the case is simply an ordinary exercise in the application of Texas substantive law to the facts at hand. Petitioner is merely dissatisfied with the outcome of that application.

Rather than being "fueled only by a determination to assert his equitable right to expect good faith and fair dealing in business transactions, and by a determination to defend the time honored Texas public policy that unfair dealing and unfaithful conduct should be redressed. . ."[7], Petitioner is fueled by the desire to avoid having to pay over to Respondent the rather substantial sum gained through the decision of the trial court which was reversed by the Fifth Circuit.

Petitioner claims that the court of appeals misapplied Texas law in three ways: (1) that the Court misconstrued the Texas law of constructive trusts; (2) that an alleged "technical fiduciary relationship" was established; and (3) that a resulting trust was proven. As will be seen from the discussion below, the court of appeals addressed and properly disposed of each of these issues in its opinions. More significantly, Petitioner's current counsel now argues that in several important respects, Texas substantive law is not as it was previously conceded and argued by Petitioner to be. Having become dissatisfied with the

[6] Following the initial appellate decision, Petitioner sought a Rehearing with a Suggested Rehearing *en banc*, which was denied. Petitioner, supported by amicus, filed a Motion to Recall the Mandate which was granted. Thereafter, the Fifth Circuit, in all important particulars, expanded on and reaffirmed its earlier decision. Petitioner has now filed another Petition for Rehearing and another Suggested Rehearing *en banc*.

[7] Petition For A Writ of Certiorari, p. 3.

results obtained from his previous theories of the requirements of Texas law to impose a constructive trust, Petitioner now states that those previously recognized "requirements" in fact do not even exist.

None of the arguments now made by Petitioner falls within the purview of those questions which will normally give rise to granting review on writ of certiorari (Supreme Ct. Rule 17.1(a)), inasmuch as there is no conflict between the decisions of the Fifth Circuit and any decision of the Texas Supreme Court (or, for that matter, of this Court). As can be seen from the truncated Statements of the Case contained in the Petition and this Response, as well as the far more detailed statements reflected in the two opinions of the court of appeals, the determination of the merits of this case is highly dependent upon a full appreciation of the *entire* factual record developed in the trial. Both decisions of the court of appeals reflect an intimate intertwining of the facts of the case (those specifically found by the trial court and those which are undisputedly in the trial record) with the case law of Texas.

Put another way, the Petitioner merely requests that this Court grant a writ of certiorari to review the full evidentiary record and inferences that might be drawn and substitute its judgment of the facts for that reflected in the two appeals court opinions. This does not form a sufficient basis for issuance of a writ of certiorari.[8] The petition, when stripped of its excess verbiage, presents the question of whether there is sufficient evidence of a substantial and long-term confidential relationship between two business associates to support imposition of a constructive trust on real property, title to which is held by one. This is just the type of factual inquiry into which this Court has repeatedly declined to engage.[9]

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[8] *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938).

[9] *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

II. The Decisions of the Fifth Circuit In This Case Correctly Interpret the Substantive Texas Law Regarding Constructive Trusts.

Texas law requires that a contract to convey real property be in writing to be enforceable. Tex. Bus. & Com. Code Ann. §26.01 (Vernon 1968). The Texas Trust Act, Art. 7525b-1 V.R.C.S. provides that no trust may be established except by written instrument. Petitioner's claims clearly fall within the provisions of these statutes of frauds, and unless an exception can be found, Petitioner's claims are unenforceable.

Texas courts have long recognized and resorted to the device of constructive trusts to remedy wrongs committed by one who has occupied a long standing position of trust and confidence and who would otherwise be unjustly enriched.[10] However, the mere incantation "contructive trust" does not abrogate the efficacy of the statute of frauds. Rather, it sets the court on a searching factual inquiry to determine whether there has been a long standing relationship of trust and confidence prior to and separate from that transaction in which a constructive trust is sought.[11] The relationship must be sufficient to give rise to a foundation for believing that one need not look out for one's on affairs—trusting that the other person will act only in the confider's best interest *and* there must be a showing that the party breaching that trust will be thereby unjustly enriched.[12]

Respondents have not found and Petitioner has not cited a single Texas case where a constructive trust was imposed upon business associates where either of those requirements was absent. Petitioner cites (at p.8) two Texas cases for the proposition that the court of appeals clearly erred by holding

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[10] *See Rankin v. Naftalis*, 557 S.W.2d 940 (Tex. 1977); *Meadows v. Bierschwale*, 516 S.W.2d 125 (Tex. 1974); *Tyra v. Woodson*, 495 S.W.2d 211 (Tex. 1973).

[11] *Sentry Title Co., supra* at 946; *See also Consolidated Gas & Equipment Co. v. Thompson*, 405 S.W.2d 333, 336 (Tex. 1966).

[12] *Rankin v. Naftalis, supra* at 944.

that a prior relationship "as a matter of law" must be a " . . . long standing fiduciary or confidential, trusting relationship unrelated to the subject transaction." Neither case supports Petitioner's contention.

Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848 (Tex. 1980), is a case dealing solely with the principal of election of remedies. It has nothing whatsoever to do with the standards or criteria for imposing a constructive trust. Indeed the only reference in the entire case to the constructive trust doctrine occurs in a passing reference to various equitable doctrines similar to the election of remedies doctrine. *Edwards v. Strong*, 213 S.W.2d 979 (Tex. 1948), while concededly a constructive trust case, is no more enlightening as to the standards which will be applied to allow a constructive trust claim to defeat a defense based on the statute of frauds, for the simple reason that the Defendant in that case failed to plead the statute of frauds as a defense, and thus could not assert it on appeal.

It is necessary to turn to those Texas cases in which constructive trust claims are analyzed in light of the principals underlying the statute of frauds in order to determine the status of applicable Texas case law. This is the very analysis which the court of appeals has now undertaken in this case on two occasions.

The court of appeals recognized that the imposition of a constructive trust is an equitable remedy and that "there is no 'unyielding formula' for determining whether a constructive trust exists on the facts of a particular case."[13] The court twice made an exhaustive analysis of the controlling Texas statutory and case law and then correctly applied that law to the facts in this case. A cornerstone of the constructive trust theory is that "there must be a fiduciary relationship before, and apart from,

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[13] *Sentry Title Co., supra* at 946; *See also Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex. 1974).

the agreement made the basis of the suit."[14] *Consolidated Gas & Equipment Co.* is a leading Texas Supreme Court decision directly on point, to which the Petitioner devotes scant attention. The court noted that a prior existing relationship could give rise to a fiduciary obligation "when, over a long period of time, the parties had worked together for the joint acquisition and development of property previous to the particular agreement sought to be enforced." *Consolidated Gas & Equipment Co., supra* at 337.

Petitioner claims that it is illogical for a prior relationship to be "separate" from the subject transaction, yet "within the scope of the parties' prior dealings."[15] This merely means that the prior dealings must be completely separate from the subject transaction. In other words, the earlier transaction must not be connected with the subject transaction; otherwise there would be no basis for a fiduciary relationship. One continuous transaction or plan will not suffice to form a fiduciary relationship. Morever, the prior dealings must also be of the same type as the subject transaction.[16] More significantly, Petitioner has, up to the time this Petition was filed, clearly argued that this requirement not only existed, but was met by Petitioner. On no less than four occasions Petitioner argued that a "confidential or trust relationship" between Ward and Whatley arose prior to and separate and apart from the Dyckman 9 acre tract and easement transaction, through the Dyckman Tract transaction was squarely within the scope of Ward and Whatley's relationship and their plan to acquire the 490 acres for Ward.[17] Indeed,

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[14] *Consolidated Gas & Equipment Co. v. Thompson*, 405 S.W.2d 333, 336 (Tex. 1966) (hereinafter referred to as *Consolidated Gas & Equipment Co.*); *See also Sentry Title Co., supra* at 946; *Accord, Rankin v. Naftalis*, 557 S.W.2d 940 (Tex. 1977); *Tyra v. Woodson*, 495 S.W.2d 211 (Tex. 1973).

[15] Petition for Writ of Certiorari, at 9.

[16] *See Rankin v. Naftalis, supra* at 944.

[17] Post-Trial Brief of Travis Ward, p. 7. See also, Trial Brief of Defendant Travis Ward, pp. 6-7; Original Brief of Appellee, pg. 32; and Supplemental Brief of Appellee, pp. 3,4,5, and 6.

Petitioner stated in his original brief in the Fifth Circuit that "the (Texas) Supreme Court in *Tyra* stated that its prior holdings established that, for a constructive trust to arise, there must be a fiduciary relationship before, and apart from, the agreement made the basis of the suit."[18] That statement of the law has been often repeated by the Texas Supreme Court.

> . . . [F]or a constructive trust to arise there must be a fiduciary relationship before and apart from the agreement made by basis of the suit. Such is our holding here. As stated, the fact that one businessman trusts another, and relies upon his promise to carry out a contract, does not create a constructive trust. To hold otherwise would render the Statute of Frauds meaningless. *Consolidated Gas* at 336.

There was no long-standing relationship between Petitioner and Respondent. Prior to 1970, they had met only once. Furthermore, the transactions involving the Dyckman property and the 490 acres are so closely related as to be characterized as part of the same transaction. The court of appeals recognized this fact:

> First, it is clear from the undisputed evidence that the acquisition of the Dyckman tract was part of the overall scheme to acquire the 490 acres. It is of compelling significance in this case that the dealings between Ward and Whatly were not prior, unrelated dealings in real property. Rather they were all part of a single master plan to acquire the 490 acres. Ward and Whatley had had no business dealings with each other prior to the arrangements to acquire the 490 acres. *Sentry Title Co., supra* at 948.

After conceding that Texas substantive law governs this action pursuant to *Erie*, Petitioner then anomolously goes on to argue the applicability of the principals enunciated in this Court's decision in *Robertson v. Chapman*,[19] a pre-*Erie* case. The Court in *Robertson* was not concerned with or governed by

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[18] Original Brief of Appellee, pg. 32.

[19] 152 U.S. 673 (1893).

the applicable state law. Because of *Erie* this Court must be guided solely by Texas law, as was the Fifth Circuit, and thus *Robertson* is of no assistance in determining whether the Fifth Circuit properly applied Texas law.

The Fifth Circuit's opinions exhaustively analyzed the doctrine of constructive trusts under Texas law. That court measured the conduct of the parties in this action against the parameters reflected in no less than a dozen Texas cases. In no case cited by Petitioner have Texas courts imposed a constructive trust on such scant evidence of a confidential relationship as was presented by Petitioner in the trial of this case.

Petitioner's argument that a principal-agent relationship was formed between the parties is similarly without merit. If the only requirement for the imposition of a constructive trust is a claim of a principal-agent relationship based on oral agreements, then the statute of frauds would be a nullity. The entire thrust of the statute of frauds is that oral agreements to convey land are not enforceable.[20] No Texas case has been cited that stands for the Petitioner's proposition. Indeed, a similar argument has been made and rejected by the Texas appellate courts.[21]

Petitioner misinterprets and distorts the discussion of unjust enrichment in the appeals court opinions. Petitioner focuses on whether Petitioner had "unclean hands" and not on whether Respondent would be unjustly enriched.[22] The question that must be answered is whether the alleged wrongdoer would be unjustly enriched if allowed to keep the proceeds.[23] The Fifth Circuit did not hold that Petitioner's unclean hands barred his equitable claim, as is suggested in the petition. The court did state that it was "... questionable whether Ward's

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[20] *Sentry Title Co., supra* at 949.

[21] *See, e.g., Cooks v. City of Plano*, 656 S.W.2d 607 (Tex. App.—Dallas 1983).

[22] Petition for Writ of Certiorari at 9-10.

[23] *Rankin v. Naftalis, supra* at 944.

concealment and schemes in this deal generally leave him with the requisite clean hands for equitable relief."[24] The significance of the Fifth Circuit's discussion of unjust enrichment lies, however, in the statement that "[t]he mere fact that one party has made a profit, though, is an insufficient ground to order restitution on a theory of unjust enrichment. The profit must be "unjust" under principals of equity."[25] The facts clearly indicate that Respondent would not be unjustly enriched.[26] Home Engineering was liable on the note and paid all interest payments on the note.[27] Home Engineering managed the property and rendered it for property taxes. As the court stated "there has been no *unjust* enrichment in this case."

Petitioner raises for the first time on appeal the issue of resulting trust. The issue was not briefed or discussed at any point of the proceedings in the Fifth Circuit, having been abandoned after being raised at the District Court level. Even so, the court of appeals correctly disposed of this issue. A resulting trust will not be created "unless the payments are made pursuant to an *enforceable agreement* upon the part of the beneficiary existing at the time the deed is executed."[28] There was no such enforceable agreement in this case or "shared intent" to create such an agreement.[29]

Petitioner's reliance on *Omohundro v. Matthews,* 341 S.W.2d 401 (Tex. 1960), is misplaced. In *Omohundro* the parties had engaged in numerous joint venture oil and gas lease acquisitions. They had previously owned the property in question jointly and were continuing to engage in other property purchases together. The Defendant purposely allowed the lease on the jointly owned property to expire and then acquired

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[24] *Sentry Title Co., Inc., supra* at 950.

[25] *Id.* at 949.

[26] *Id.* at 949-50.

[27] *Id.* at 950.

[28] *Bybee v. Bybee,* 644 S.W.2d 218, 221 (Tex. App.—Fort Worth 1982, no writ) (emphasis added).

[29] *Sentry Title Co., supra* at 946.

the lease in his own name. The facts in the *Consolidated Gas*, case, *supra*, are however, virtually identical to those in the instant case. In *Consolidated* the Texas Supreme Court reversed the trial court's imposition of a constructive trust and held that:

> The fact that people have had prior dealings with each other and that one party subjectively trusts the other does not establish a confidential relationship. Thigpen v. Locke, supra. That opinion reasoned that "[b]usinessmen generally do trust one another, and their dealings are frequently characterized by cordiality * * *." The dissent in *Thigpen* recognized that fact; but took the view that over the long period of years, a relationship of financial advisor and confidante had arisen between a trust officer of a bank and his friend, a customer of the bank, which raised an issue of fact as to a confidential relationship.
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> * * *
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> This Court in Gaines v. Hamman, supra, as well as in Thigpen v. Locke, supra, recognized that a fiduciary relationship could arise outside of those relationships listed above when, over a long period of time, the parties had worked together for the joint acquisition and development of property previous to the particular agreement sought to be enforced. The proof in this case simply does not show such a relationship of the parties as to come within the exceptions recognized in the *Gaines* and *Thigpen* opinions. There is no constructive trust. 405 S.W.2d at 336-37.

III. The Decision of the Fifth Circuit Is In Compliance With the Federal Rules of Civil Procedure and Established Judicial Policy.

Section 2 of Petitioner's argument reflects a lack of understanding of the court of appeals decision. Rule 52(a) was followed by the Court. The court of appeals did not challenge the trial court's findings of fact; thus Petitioner's argument concerning Rule 52(a) is largely irrelevant. The Rule does not

apply when the trial court interprets the law incorrectly.[30] Rather, the circuit court set aside certain conclusions of law relied upon by the district court.[31] The court of appeals held that the "district court erred in finding a pre-existing confidential relationship between Ward, Whatley, and Hart prior to and separate from the Dyckman transactions."[32]

Accepting the district court's essential factual findings, there remains no findings or evidence of a long standing relationship of trust and confidence built on a series of transactions which the Texas courts have always required to impose a constructive trust on business associates. Similarly, there is no evidence which would support a finding that Respondent will be unjustly enriched in this case.

It is Petitioner who refused to become liable on the notes given for the properties involved, including the Dyckman Tract. It is Petitioner who wanted to hide his name and not have it associated with these deals. Respondent signed the note, made the interest payments and rendered the property for tax purposes. Thus, the appellate decision correctly concluded that Respondent was not being unjustly enriched.

Petitioner also uses fallacious reasoning in stating that because the facts establish a constructive or resulting trust, then reversal is prohibited by Rule 52(a). The fallacy is that the facts in this case did not support either type of trust. The plain and simple fact is that the district court improperly applied the law to the facts. The district court finding of unjust enrichment was a conclusion of law[33] and may be set aside by the Court of Appeals without regard to Rule 52(a). A careful reading of the Court of Appeals decisions shows that the Court correctly applied the controlling Texas law to the facts in this case.

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[30] *See Johnson v. Uncle Ben's, Inc.*, 617 F.2d 419 (5th Cir. 1980); *Grant v. Smith*, 574 F.2d 252 (5th Cir. 1978).

[31] *Sentry Title Co., supra* at 948-50.

[32] *Id.* at 950; *Harris v. Sentry Title Co.*, No. 82-1108, slip op. at 2803 (5th Cir. Mar. 12, 1984) (second opinion).

[33] District Court Conclusion of Law No. 7.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Original signed by
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By: _____
(Counsel for Respondent)

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 1984, I served copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari on the several parties hereto by mailing three copies of said document by United States mail, in duly addressed envelopes, with postage prepaid, to each of the following persons:

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I further certify that all parties required to be served have been served.

Original signed by
J. Albert Kroemer

J. Albert Kroemer